

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELSIE L. PRICE and DEPARTMENT OF THE ARMY,  
RED RIVER ARMY DEPOT, Texarkana, TX

*Docket No. 02-755; Submitted on the Record;  
Issued July 23, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied modification of its 1999 determination of appellant's wage-earning capacity; and (2) whether the Office properly determined appellant's wage-earning capacity commencing December 11, 2001.

On November 19, 1990 appellant, then a 57-year-old preservation work planner, sustained a back injury in the performance of duty when she was struck on the left hip by a forklift. The Office accepted appellant's claim for a contusion of the back and later for a compression fracture of the L2 vertebrae. Subsequently, the Office authorized a lumbar laminectomy, L4-5 and L5-S1 with decompression and foraminotomy of the L5 nerve root and S1 nerve root on the left, a posterolateral fusion, L4 to the sacrum with bone graft from the left iliac crest and internal fixation with CD screws at L4 and the sacrum and bilaterally and CCD rods with DTT crossing. The surgery was performed on November 30, 1993. On January 24, 1995 appellant underwent additional authorized surgery to remove the rods and screws, refusion with bone bank bone and implant of a bony spinal fusion stimulator.

On November 24, 1996 appellant fell at a gas station injuring her left hip. On November 25, 1996 she underwent surgery for a total hip replacement.

On February 13, 1997 appellant was granted a schedule award for a 19 percent permanent impairment of each lower extremity, causally related to her accepted back conditions. The period of the award ran from February 2, 1997 to March 10, 1999.

On March 24, 1997 the Office issued a notice of proposed reduction of compensation, finding that the January 18, 1997 medical opinion of Dr. A. Edward Dean, appellant's treating physician, established that she had the capacity to earn wages for 2 to 4 hours a day, with restrictions on bending and twisting and lifting more than 10 pounds. The Office found that Dr. Dean's opinion constituted the weight of medical opinion and that appellant could perform the sedentary position of receptionist, four hours a day. The Office found that the position was

inside, required occasional lifting up to 10 pounds and the ability to reach, handle, finger, talk and hear and required 3 to 6 months of experience or education. The Office also found that appellant had the experience to perform the duties of the constructed position and it was reasonably available.

In a decision dated March 10, 1999, the Office determined that appellant had the capacity to perform the duties of a receptionist, four hours a day. The Office reduced appellant's compensation effective March 11, 1999 to reflect her capacity to earn wages in the selected position.

On August 15, 2000 appellant filed a claim for a recurrence of disability, contending that her November 24, 1996 left hip injury and total hip replacement of November 25, 1996 were causally related to her accepted back injury and associated surgeries.

In a decision dated December 4, 2000, the Office denied appellant's recurrence of disability claim, finding that appellant had submitted insufficient medical evidence in support of the claim. The Office declined to modify the March 10, 1999 wage-earning capacity decision.

Appellant requested review of the written record and submitted additional evidence in support of her recurrence of disability beginning November 25, 1996. In a decision dated May 23, 2001, an Office hearing representative found that appellant had failed to meet her burden of proof to establish a recurrence of disability warranting modification of the 1999 wage-earning capacity decision.

By letter dated August 10, 2001, appellant requested reconsideration of the Office's prior decisions. She asserted that her November 30, 1993 employment-related back surgery, which included a bone graft taken from the left iliac crest, had damaged her left hip, resulting in her November 24, 1996 fall, which necessitated her left hip replacement surgery on November 25, 1996.

In support of her claim, appellant submitted a July 27, 2001 report from Dr. Joseph Greenspan, her treating Board-certified physiatrist, who stated that appellant's employment-related back injury, with associated multiple surgeries, immobilization and chronic pain, caused appellant to develop osteoporosis, as well as a severe hip deformity. He explained that this was due to abnormal torsion forces following spine fusion and noted that these two conditions eventually resulted in a spontaneous nontraumatic fracture to the left hip, necessitating left hip replacement surgery on November 26, 1996. Dr. Greenspan added that another causative factor for appellant's osteoporosis and fracture was the harvesting of autologous bone from the left iliac crest for the original spine fusion. He further stated that the fused spine and injured hip, along with a predisposing diabetic neuropathy, also led to advanced degenerative arthritis of the right knee. With respect to appellant's ability to work, Dr. Greenspan concluded:

“[I]t is my medical opinion that her chronic back pain, her fractured vertebral bodies, her failed laminectomy syndrome, her postoperative chronic arachnoiditis, her osteoporosis and her osteoarthritis are a direct result of her [November 19, 1990] injury. That injury was the proximate cause of the patient's disabling condition. The disabling condition is clearly related to the work injury. The

patient is medically permanently disabled. She probably reached maximum medical improvement in May 1997 some six months after her hip fracture repair. It is my opinion that this patient is disabled from doing any type of work.”

On November 14, 2001 the Office referred appellant for a second opinion examination to Dr. Julius Sheppard, a Board-certified orthopedic surgeon. The Office provided Dr. Sheppard with appellant’s medical records, a statement of accepted facts and a list of questions to be addressed.

In a medical report dated December 11, 2001, Dr. Sheppard indicated that he reviewed the records provided to him and physically examined appellant. Regarding appellant’s left hip condition and its possible relationship to her accepted back conditions, Dr. Sheppard stated:

“The patient’s fall in Nov[ember] 1996, which resulted in a femoral neck fracture is difficult to blame on her work injury of Nov[ember] 1990. The injuries that were noted at that time were lumbar strain, contusion of the back and compression fracture of L2. However, the fact that subsequent to this the patient continued to have problems and eventually had to have surgery two levels below the compression fracture and surgery also in the L5-S1, which had previously been operated on in 1981, this history clouds the issue as to cause of her fall. Apparently, there was evidence of muscle wasting in 1993 and [magnetic resonance imaging scan] and myelogram evidence of nerve encroachment by a disc and arthritic changes in both [L]4-5 and [L]5-[S]1 inner spaces. If as it is implied accepting her need for surgery at the L5-S1 and L4-5 areas was part of the accepted facts, then the weakness and instability and loss of dexterity in her lower extremities would have to be blamed more on radicular irritation in her low back and not from the compression fracture originally accepted as facts.”

With respect to the chronic back pain, fractured vertebral bodies, failed laminectomy syndrome, postoperative chronic arachnoiditis, osteoporosis and osteoarthritis diagnosed by appellant’s treating physician, Dr. Sheppard agreed that each of these conditions was causally related, at least in part, to appellant’s November 1990 work injury and accepted back surgeries. With respect to appellant’s ability to perform the position of receptionist, four hours a day, Dr. Sheppard responded:

“I do not think [appellant] is totally disabled from all work and ... could be gotten back in for limited hours as a receptionist.... I do n[o]t know that four hours a day is useful but I think there is a possibility she could be able to work toward this goal if not achieving it.”

In an accompanying work capacity evaluation Form OWCP-5c, Dr. Sheppard stated that appellant could work three to four hours a day and within this time could sit three to four hours, walk and stand one-half hour each, reach, including above the shoulder, for three hours and push, pull and operate a motor vehicle for one-half hour each. He further indicated that appellant could perform repetitive motions for the wrists, but needed 15-minute breaks every 2 hours. He stated that appellant could not perform any twisting, lifting, squatting, kneeling or climbing.

Dr. Sheppard added that these restrictions were due to appellant's spondylosis and radiculitis in the lumbar region L5-S1 and failed fusion in L4-5/S1.

In a decision dated January 16, 2002, the Office found that the additional medical evidence was sufficient to establish that appellant's left hip condition and associated hip replacement surgery were consequential injuries causally related to her accepted back injuries and surgeries. The Office accepted that appellant sustained a recurrence of total disability for the period November 25, 1996 to December 11, 2001, the date of her left hip replacement surgery to the date of Dr. Sheppard's medical report. The Office found that the weight of the medical evidence, represented by the opinion of Dr. Sheppard, established that appellant was capable of performing the selected receptionist position, four hours a day. Therefore, as appellant's capacity for work after December 11, 2001 was determined to be the same as on March 11, 1999, the date of the original wage-earning capacity decision, the Office declined to modify the March 11, 1999 decision.

The Board finds that the Office improperly refused to modify its 1999 determination of appellant's wage-earning capacity.

The general test for determining loss of wage-earning capacity is whether injury-related residuals prevent the employee from performing the kind of work he or she was doing when injured.<sup>1</sup> When the medical evidence establishes that the residuals of an employment injury prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any resulting loss of wage-earning capacity.<sup>2</sup> Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition, or the employee has been retrained or otherwise vocationally rehabilitated.<sup>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity.<sup>4</sup>

Appellant filed a claim for a recurrence of disability beginning November 25, 1996, contending that her left hip replacement surgery and disability were causally related to her accepted back condition and surgeries. Appellant bore the burden of proof to establish the causal relationship of her left hip condition and surgery were due to her accepted 1990 back injury and resulting residuals.<sup>5</sup> This burden of proof was met by establishing through the medical evidence that her left hip condition and resulting total disability were consequential to the accepted injury.<sup>6</sup> The Office accepted that appellant's left hip condition and resulting surgery were a

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<sup>1</sup> See *Donald Johnson*, 44 ECAB 540 (1993); *Diane M. Hackney*, Docket No. 96-1078 (issued March 19, 1999).

<sup>2</sup> See *Lyle E. Dayberry*, 49 ECAB 369 (1998).

<sup>3</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Derrick Higgin*, 50 ECAB 213 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

<sup>4</sup> See *James D. Champlain*, 44 ECAB 438, 440 (1993).

<sup>5</sup> See *Janice J. Green*, 49 ECAB 307 (1998).

<sup>6</sup> See *Dana Bruce*, 44 ECAB 132 (1992).

natural consequence of the prior back surgeries, which included a left iliac crest graft.<sup>7</sup> The Office accepted that appellant was totally disabled from November 25, 1996 to December 11, 2001 and paid compensation for total disability less the compensation previously paid under the wage-earning capacity. The January 16, 2002 decision stated, “However, the wage-earning capacity based upon the position of receptionist is not modified as the weight of the medical evidence establishes that [appellant] is physically capable of performing that position four hours a day, the same as when the original determination was made.”

The Board finds that by accepting appellant’s claim and resulting total disability for the period November 25, 1996 to December 11, 2001, the Office should have modified the March 11, 1999 wage-earning capacity because appellant established a material change in the nature and extent of her injury-related condition. The medical evidence developed subsequent to the 1999 determination established that appellant’s accepted back injury resulted in residuals which led to her fall on November 24, 1996, total hip replacement surgery of November 25, 1996 and total disability for work after that date.

The Board further finds that the Office failed to meet its burden of proof to establish that appellant had the physical capacity to perform the duties of a receptionist, four hours a day, commencing December 11, 2001.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>8</sup> After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>9</sup> The fact that the Office accepts appellant’s claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.<sup>10</sup>

As the Office accepted that appellant was totally disabled for the period November 25, 1996 through December 11, 2001 and paid compensation benefits for this period, it became the Office’s burden to establish that appellant’s condition was no longer totally disabling after December 11, 2001. The January 16, 2002 decision attempted to leave the 1999 wage-earning capacity decision in place on the grounds that the weight of the medical evidence, represented by the opinion of Dr. Sheppard, the Office referral physician, established that appellant had the medical capacity to perform the part-time receptionist position after December 11, 2001, the date of his examination. The Board finds a conflict in medical opinion between Dr. Sheppard and

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<sup>7</sup> When the primary injury is shown to have arisen in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment unless it is the result of an independent intervening cause. *See Stuart K. Stanton*, 40 ECAB 859 (1989); *Charles J. Jenkins*, 40 ECAB 362 (1988).

<sup>8</sup> *William T. Abernathy*, 48 ECAB 687 (1997).

<sup>9</sup> *Paul F. Rosen*, 48 ECAB 596 (1997); *Beverly J. Duffey*, 48 ECAB 569 (1997).

<sup>10</sup> *Patrick P. Curran*, 47 ECAB 247 (1995); *Dawn Sweazey*, 44 ECAB 824 (1993).

Dr. Greenspan, appellant's treating physician, both of whom are Board-certified specialists in their respective fields, on the issue of appellant's capacity for work. In contrast to Dr. Sheppard, who opined that appellant could perform the duties of the receptionist position subject to specified physical limitations; Dr. Greenspan found that appellant was totally disabled due to residuals of her accepted back injury, resulting surgeries and the accepted consequential injury to the left hip.

Section 8123 of the Federal Employees' Compensation Act<sup>11</sup> provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>12</sup> As the Office did not refer appellant for an impartial medical examination to resolve the conflict in medical opinion as to her capacity for work as a receptionist, it failed to meet its burden of proof to reduce appellant's compensation effective December 11, 2001 or to reinstate the wage-earning capacity of 1999 as of that date.

The decision of the Office of Workers' Compensation Programs dated January 16, 2002 is affirmed with regard to accepting appellant's claim of consequential injury. The decision is reversed with regard to finding that appellant did not establish a basis for modification of the 1999 wage-earning capacity determination and in reducing appellant's compensation commencing December 11, 2001.

Dated, Washington, DC  
July 23, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> 5 U.S.C. § 8123(a).

<sup>12</sup> *Shirley L. Steib*, 46 ECAB 39 (1994).